

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

STEVEN T. WALTNER & SARAH V.	)	
WALTNER,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 1729-13
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	
	)	

**ORDER**

In our Opinion in Waltner v. Commissioner, T.C. Memo. 2014-133, at \*22-\*24, we sanctioned petitioners pursuant to section 6673(a)(1)<sup>1</sup> and stated that “we believe that petitioners’ counsel may also be deserving of a sanction for unreasonably and vexatiously prolonging these proceedings.” Accordingly, on July 15, 2014, we ordered petitioners’ counsel, Donald W. Wallis, to show cause why the Court should not require him to pay respondent’s excess costs, if any, pursuant to section 6673(a)(2) or sanction him pursuant to Rule 33(b). We also ordered respondent’s counsel to state respondent’s position regarding whether the Court should sanction Mr. Wallis and to set forth respondent’s computation of the excess costs, if any, that respondent incurred.

Mr. Wallis filed a response to the order to show cause in which he objected to the imposition of sanctions on him. Respondent’s counsel filed a response requesting that we impose on Mr. Wallis a sanction of \$16,750 pursuant to section 6673(a)(2) or Rule 33(b) for the excessive costs respondent incurred in this case. We ordered Mr. Wallis to reply to respondent’s response, and he filed a reply. For the reasons that follow we will order Mr. Wallis to pay \$15,550 to respondent.

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<sup>1</sup>Unless otherwise indicated, all section references are to the Internal Revenue Code (Code), as amended and in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

## Background

### Previous Proceeding Involving Mr. Wallis

We have previously warned Mr. Wallis that we would sanction him if he persisted in raising frivolous arguments before this Court. In Tinnerman v. Commissioner, T.C. Memo. 2010-150, 100 T.C.M. (CCH) 20, 23 (2010), aff'd, 448 Fed. Appx. 73 (D.C. Cir. 2012), we imposed a penalty of \$25,000 pursuant to section 6673(a)(1) on a taxpayer represented by Mr. Wallis. In doing so we warned Mr. Wallis as follows:

The attention of petitioner's counsel is directed to Rule 3.1 of the Model Rules of Professional Conduct of the American Bar Association (Model Rule 3.1), applicable here under Rule 201(a), and to section 6673(a)(2). See Takaba v. Commissioner, 119 T.C. 285, 296-305 (2002); Nis Family Trust v. Commissioner, 115 T.C. 523, 547-553 (2000); see also Powell v. Commissioner, T.C. Memo. 2009-174; Edwards v. Commissioner, T.C. Memo. 2003-149, aff'd, 119 Fed. Appx. 293 (D.C. Cir. 2005). We recognize that counsel cooperated in presenting this case on the stipulation, but the filings in responses to motions and in briefs demonstrate reckless disregard of the facts and the settled law and contentions so lacking in merit as to be frivolous, dilatory, and subject to sanctions. See, e.g., United States v. Patridge, 507 F.3d 1092, 1095-1097 (7th Cir. 2007) (counsel was sanctioned in part for arguing that a collection hearing could be used to contest previously determined substantive liabilities); Johnson v. Commissioner, 116 T.C. 111 (2001), aff'd, 289 F.3d 452, 456-457 (7th Cir. 2002); see also United States v. Collins, 920 F.2d 619, 624-628 (10th Cir. 1990); United States v. Nelson (In re Becraft), 885 F.2d 547, 548 (9th Cir. 1989) (sanctions were imposed on counsel in criminal cases, notwithstanding greater leeway generally allowed under Model Rule 3.1); Charczuk v. Commissioner, 771 F.2d 471 (10th Cir. 1985), aff'g T.C. Memo. 1983-433. We will deny respondent's motion for a penalty against counsel under section 6673(a)(2). However, we issue this warning for the future to present counsel and to those similarly situated.

Id. at 23-24.

On appeal in Tinnerman Mr. Wallis apparently persisted in raising frivolous arguments before the U.S. Court of Appeals for the District of Columbia Circuit. Consequently, the Court of Appeals imposed a sanction of “\$8,000 to be imposed jointly and severally against the Appellant and his counsel, Donald W. Wallis, for pursuing a frivolous appeal.” Tinnerman v. Commissioner, 448 Fed. Appx. 73 (citing sec. 7482(c)(4); 28 U.S.C. sec. 1912; Fed. R. App. P. 38), aff’g 100 T.C.M. (CCH) 20.

### Proceedings Involving Petitioners

For many years petitioners have wasted the resources of this Court, other courts, respondent, and the Department of Justice with matters arising from the filings of their frivolous 2003-08 Federal income tax returns. Initially, they filed a suit in the U.S. Court of Federal Claims, seeking to recover refunds of allegedly overpaid Federal income tax for 2003-08. See Waltner v. United States, 98 Fed. Cl. 737, 739 (2011), aff’d, 679 F.3d 1329 (Fed. Cir. 2012). The Court of Federal Claims dismissed petitioners’ refund suit with respect to 2004-08 because it held that it lacked jurisdiction. See id. at 761. It explained as follows:

[P]laintiffs in this case did not submit sufficient information for tax years 2004, 2005, 2006, 2007, and 2008 for any of the plaintiffs’ returns to be considered valid tax returns. For each of the tax years, the plaintiffs claim zero in tax liability, allege that no wages were received by plaintiffs, and allege that the amount of dividends received each year was zero. The plaintiffs did not provide the IRS with sufficient information for the tax years at issue, such that the IRS could calculate their tax liability, and therefore, the returns filed by the plaintiffs were neither proper returns or proper claims for refund. As the plaintiffs failed to file properly completed, timely returns for each of the tax years at issue, the court lacks jurisdiction for the plaintiffs’ claims for refund tax years 2004, 2005, 2006, 2007, and 2008.

### Id.

The U.S. Court of Appeals for the Federal Circuit affirmed the dismissal of petitioners’ refund suit. See Waltner, 679 F.3d at 1334. The Supreme Court of the United States denied the petition for certiorari in petitioners’ refund suit. See Waltner v. United States, 133 S. Ct. 319 (2012). Mr. Wallis represented petitioners

before the Supreme Court. See id. (No. 12-75), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-75.htm> (last visited Nov. 20, 2014).

Petitioners have three docketed cases currently pending before the Court: (1) Steven T. Waltner & Sarah V. Waltner v. Commissioner, docket No. 8726-11L (regarding a notice of lien filed with respect to both petitioners' liability for a section 6702 penalty for 2003-2007; a notice of intent to collect by levy with respect to Mr. Waltner's liability for a section 6702 penalty for 2003, 2005, 2006, and 2007; and respondent's efforts to collect by lien and levy both petitioners' 2006 Federal income tax liability); (2) Steven T. Waltner & Sarah V. Waltner v. Commissioner, docket No. 1729-13 (this case); and (3) Steven T. Waltner & Sarah V. Waltner v. Commissioner, docket No. 12722-13L (regarding a notice of intent to collect by levy a section 6702 penalty for 2004). Mr. Waltner also previously had a docketed case before the Court that is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit: Steven T. Waltner v. Commissioner, docket No. 21953-12L (regarding a notice of intent to collect by levy Mr. Waltner's section 6702 penalty for 2008). Mr. Wallis has entered an appearance for petitioners in each of these cases. (He subsequently withdrew from the case at docket No. 21953-12L, but he has since entered an appearance for Mr. Waltner before the Ninth Circuit). All four of these cases and the Court of Federal Claims case are based on petitioners' frivolous position that the bulk of their income--primarily the wages of Mr. Waltner--is not taxable.

In our Opinion in this case we imposed a penalty under section 6673(a)(1) on petitioners because they maintained frivolous positions before this Court and we indicated that we believed that Mr. Wallis' conduct in this case was deserving of sanction pursuant to section 6673(a)(2) and Rule 33(b). See Waltner v. Commissioner, T.C. Memo. 2014-133, at \*22-\*24. However, because some of the costs in this case were incurred before Mr. Wallis entered an appearance and because we recognized that some of the issues in this case were not frivolous, we instructed respondent not to include costs incurred before petitioners' counsel entered an appearance or costs attributable to the issues of (1) whether the statute of limitations on assessment and collection applies in this case; (2) whether petitioners had unreported income from the sale of assets in Mr. Waltner's Citigroup account; (3) whether petitioners are liable for an accuracy-related penalty under section 6662(a); and (4) whether petitioners are liable for an addition to tax under section 6651(a)(1). See id. at \*24 n.7.

In his response respondent seeks reimbursement for (1) 48 of 91.5 hours of work performed by Attorney Michael Lloyd; (2) 17 of 37 hours of work performed by Attorney Hilary March; and (3) 15 of 18 hours of work performed by Supervisory Attorney Bridget Tombul. The hours worked by these attorneys are detailed in declarations accompanying respondent's response. Respondent appropriately excluded hours attributable to the items we enumerated in footnote 7 of the Opinion in this case. Respondent seeks to be reimbursed at a rate of \$200 per hour for the work performed by Ms. March and Mr. Lloyd and \$250 per hour for the work performed by Ms. Tombul. Respondent notes, however, that petitioners filed additional, frivolous motions after the Court issued its Opinion in this case and respondent's counsel will be required to perform additional work in responding to those motions.

Mr. Lloyd is an attorney with the Internal Revenue Service (IRS), Office of Chief Counsel, Small Business/Self-Employed, in Denver, Colorado. He has been an attorney with the IRS since 1991.

Ms. March is an attorney with the IRS, Office of Chief Counsel, Procedure & Administration, in Washington D.C. Ms. March has been an attorney with the IRS since August 2011.

Ms. Tombul, an attorney, is a Senior Technician Reviewer with the IRS, Office of Chief Counsel, Procedure & Administration, in Washington D.C. She has been an attorney with the IRS for more than 15 years.

### Discussion

If an attorney admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, section 6673(a)(2)(A) authorizes the Court to require the attorney to "pay personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct". In Harper v. Commissioner, 99 T.C. 533, 545 (1992), we relied upon case law under 28 U.S.C. sec.1927 (2012) to ascertain the level of misconduct justifying sanctions under section 6673(a)(2). The language of 28 U.S.C. section 1927 (2012) is substantially identical to that of section 6673(a)(2), and the two statutes serve the same purposes in different forums. See Harper v. Commissioner, 99 T.C. at 545.

In Harper v. Commissioner, 99 T.C. at 545-546, we observed that, although most of the U.S. Courts of Appeals require a finding of bad faith as a condition for imposing sanctions under 28 U.S.C. section 1927 (2012), a few have adopted the

lower threshold of recklessness. The U.S. Court of Appeals for the District of Columbia Circuit has not adopted either standard. See LaPrade v. Kidder Peabody & Co., Inc., 146 F.3d 899, 905 (D.C. Cir. 1998) (“This court has not yet established whether the standard for imposition of sanctions under 28 U.S.C. \* \* \* [section] 1927 should be ‘recklessness’ or the more stringent ‘bad faith.’”). But see Reliance Ins. Co. v. Sweeney Corp., Md., 792 F.2d 1137, 1138 (D.C. Cir. 1986) (stating that bad faith is not required). The venue for appeal of the sanctions we impose on Mr. Wallis may be to the U.S. Court of Appeals for the District of Columbia Circuit. See sec. 7482(b)(1) (second sentence); Byers v. Commissioner, 740 F.3d 668 (D.C. Cir. 2014), aff’g T.C. Memo. 2012-27. But compare Johnson v. Commissioner, 289 F.3d 452 (7th Cir. 2002) (affirming Tax Court’s imposition of a section 6673(a)(2) penalty without discussing venue), aff’g 116 T.C. 111 (2001), with Dornbusch v. Commissioner, 860 F.2d 611 (5th Cir. 1988) (appellate venue lies in the U.S. Court of Appeals for the District of Columbia Circuit under the second sentence of section 7482(b)(1) in the case of an appeal of a criminal contempt sentence imposed on a witness by the Tax Court). If the appellate venue for Mr. Wallis is not the U.S. Court of Appeals for the District of Columbia Circuit, it is likely the U.S. Court of Appeals for the Ninth Circuit. See sec. 7482(b)(1)(A). In Fink v. Gomez, 239 F.3d 989, 993 (9th Cir. 2001), the U.S. Court of Appeals for the Ninth Circuit has stated that “recklessness suffices for \* \* \* [sanctions under 28 U.S.C. section] 1927, but bad faith is required for sanctions under the court’s inherent power.” Because we are uncertain of appellate venue, and because we find that petitioners’ counsel’s conduct would constitute bad faith under Ninth Circuit cases applying a bad faith standard, see, e.g., Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) (“A finding of bad faith is warranted where an attorney ‘knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.’”) (quoting In re Keegan Mgmt. Co., Sec. Litig., 78 F.3d 431, 436 (9th Cir. 1996)), we shall--for purposes of this case--adopt that standard, see Takaba v. Commissioner, 119 T.C. at 297-298; Nis Family Trust v. Commissioner, 115 T.C. at 548.

We may consider Mr. Wallis’ record of asserting frivolous claims before this Court and other courts--thereby exposing his clients to sanctions--in determining whether he had bad faith in asserting frivolous arguments in this case. See Johnson v. Commissioner, 289 F.3d at 456-457. “[I]ndeed \* \* \* [we] would \* \* \* [be] remiss not to consider it.” Id. (citing S Indus., Inc. v. Centra 2000, Inc., 249 F.3d 625, 628-629 (7th Cir. 2001), In re Joint E. & S. Dists. Asbestos Litig., 22 F.3d 755, 759 n.8 (7th Cir. 1994), Fink v. Gomez, 239 F.3d 989, 992 (9th Cir. 2001), and Doering v. Union Cnty. Bd. of Chosen Freeholders, 857 F.2d 191, 197

n.6 (3d Cir. 1988)). Additionally, “dogged good-faith persistence in bad conduct becomes sanctionable once an attorney learns or should have learned that it is sanctionable.” Id. (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978), and In re TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985)).

Mr. Wallis knew--or should have known--that some of the positions that petitioners were raising before this Court were frivolous. Nonetheless, he entered an appearance and persisted in advancing those positions. He also signed petitioners’ amended petition and a reply to respondent’s answer to the amended petition, in which pleadings he asserted petitioners’ frivolous positions. In doing so he unreasonably and vexatiously multiplied the proceedings before this Court. Indeed, Mr. Wallis continues to assert the same frivolous positions in his response to the order to show cause and in his reply to respondent’s response. Mr. Wallis’ knowing assertion of frivolous positions before this Court supports a finding that he acted in bad faith. See Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d at 648. Additionally, the fact that Mr. Wallis persisted in asserting frivolous arguments before this Court after being warned that such conduct is sanctionable, see Tinnerman v. Commissioner, 100 T.C.M. (CCH) at 23, further supports a finding that he acted in bad faith, see Johnson v. Commissioner, 289 F.3d at 456-457. Indeed, the U.S. Court of Appeals for the D.C. Circuit has already sanctioned Mr. Wallis for similar conduct. See Tinnerman v. Commissioner, 448 Fed. Appx. 73. We conclude that Mr. Wallis--in bad faith--unreasonably and vexatiously multiplied the proceedings before this Court within the meaning of section 6673(a)(2). Alternatively, we could sanction Mr. Wallis under Rule 33(b) for the same reasons.

Attorney’s fees awarded under section 6673(a)(2) are computed by multiplying the number of excess hours reasonably expended on the litigation by a reasonable hourly rate. The product is known as the “lodestar” amount. Harper v. Commissioner, 99 T.C. at 549. The hourly rate properly charged for the time of a Government attorney is the “amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation.” Id. at 551. However, we shall only impose on Mr. Wallis those excess costs that are related to the frivolous positions that he advanced in this case or that are attributable to submissions, or parts thereof, that we conclude he filed in bad faith. Accordingly, in addition to those costs described in footnote 7 of the Opinion in this case, we shall exclude 6 hours that Mr. Lloyd spent reviewing and responding to petitioners’ motions to continue the trial and to change the place of trial dated November 25 and 26, 2013, respectively, and reviewing petitioners’ motions to reconsider or vacate our denial of those motions dated December 12,

2013. We find that the remainder of the excessive hours that respondent seeks reimbursement for are reasonable for the work described. See United States v. \$12,248 U.S. Currency, 957 F.2d 1513, 1520 (9th Cir. 1991).

Mr. Wallis does not object to respondent's requested hourly rate of \$200 for Ms. March and Mr. Lloyd's time and \$250 for Ms. Tombul's time. In Takaba v. Commissioner, 119 T.C. at 303-305, we found that an hourly rate of \$150 for a Chief Counsel trial attorney and \$200 for an Associate Area Counsel located in Hawaii in 2000-2002 was reasonable. As respondent's response more fully explains a cost-of-living adjustment to the amount found to be reasonable in Takaba is appropriate. We therefore conclude that respondent's requested hourly rates are reasonable.

Having established the compensable hours and the reasonable hourly rate we calculate the "lodestar" amount as follows:

<u>Attorney</u>	<u>Hours allowed</u>	<u>Hourly rate</u>	<u>Total</u>
Ms. Tombul	15	\$250	\$3,750
Ms. March	17	200	3,400
Mr. Lloyd	42	200	<u>8,400</u>
Total			15,550

We conclude that Mr. Wallis should be required to pay the lodestar amount of \$15,550 to respondent. Although this computation does not include any costs that respondent may have incurred in this case following the filing of respondent's response, we will not order respondent to supplement his response to include any additional excessive costs he may have incurred since the filing of his response because we conclude that the lodestar amount as calculated to date is an adequate award to compensate for the excessive costs under the circumstances of this case. It is therefore

ORDERED that the order to show cause dated July 15, 2014, as regards petitioners' counsel, is made absolute. It is further

ORDERED that petitioners' counsel, Donald W. Wallis, shall personally pay excess costs of \$15,550 to respondent pursuant to section 6673(a)(2), that he shall make payment by means of a certified check, cashier's check, or money order in favor of the Internal Revenue Service, that such payment be delivered to respondent's counsel at the Office of Associate Area Counsel, Suite 300 North, 600 17th St., Denver, CO 80202, not later than 30 days from the date this order is served, and that respondent shall report to the Court in writing if such payment is not timely received.

**(Signed) L. Paige Marvel  
Judge**

Dated: Washington, D.C.  
December 15, 2014